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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 KIM FORTES,
12
13 v. Plaintiff,
14 MICHAEL J. ASTRUE, Commissioner or
Social Security,
15 Defendant.
16

CASE NO. 08cv317 BTM(RBB)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

17 Plaintiff and Defendant have filed cross-motions for summary judgment. For the
18 reasons set forth below, Plaintiff's motion is **GRANTED** and Defendant's motion is
19 **DENIED**.

20 **I. PROCEDURAL BACKGROUND**

21 In December, 2001, Plaintiff protectively filed applications for Disability Insurance
22 Benefits and Supplemental Security Income under Titles II and XVI of the Social Security
23 Act. Plaintiff alleged disability beginning December 15, 2001. Plaintiff's claims were
24 denied initially and upon reconsideration. On February 22, 2007, a hearing was held
25 before Administrative Law Judge ("ALJ") Leland H. Spencer. Plaintiff, who was
26 represented by an attorney, testified on her own behalf. A medical expert and vocational
27 expert also testified.

28 In a decision dated May 24, 2007, the ALJ found that Plaintiff was not disabled.

1 The ALJ found that (1) Plaintiff meets the insured status requirements of the Social
 2 Security Act through March 31, 2002; (2) Plaintiff has not engaged in substantial gainful
 3 activity since December 15, 2001; (3) Plaintiff has the following severe impairments:
 4 lumbar strain, spondylolisthesis and degenerative disc disease of the lumbar spine;
 5 cervical strain; right wrist and hand carpal tunnel syndrome and polyneuropathy; and
 6 major depressive disorder; (4) Plaintiff does not have an impairment or combination of
 7 impairments that meets or medically equals one of the listed impairments in 20 CFR Part
 8 404, Subpart P, Appendix 1; (5) Plaintiff has the residual functional capacity to lift or carry
 9 10 pounds frequently and 20 pounds occasionally; sit for 6 hours out of an 8-hour
 10 workday; stand for 6 hours out of an 8-hour workday; no more than occasional bending
 11 and stooping; no more than occasional use of the right (dominant) hand for gross
 12 handling and fine fingering; no more than frequent rotation of the neck; and mentally
 13 limited to simple and repetitive tasks; (6) Plaintiff is unable to perform any past relevant
 14 work; and (7) considering Plaintiff's age, education, work experience, and residual
 15 functional capacity, there are jobs that exist in significant numbers in the national
 16 economy that Plaintiff can perform, specifically "host" and "cashier."¹

17 The ALJ's decision became the final decision of the Commissioner when the
 18 Appeals Council denied Plaintiff's request for review. On February 19, 2008, Plaintiff
 19 commenced this action for judicial review pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

21
 22 ¹ Under the Social Security Regulations, the determination of whether a claimant is
 23 disabled within the meaning of the Social Security Act is a five step process. The five steps
 24 are as follows: (1) Is the claimant presently working in any substantially gainful activity? If
 25 so, then the claimant is not disabled. If not, then the evaluation proceeds to step two. (2) Is
 26 the claimant's impairment severe? If not, then the claimant is not disabled. If so, then the
 27 evaluation proceeds to step three. (3) Does the impairment "meet or equal" one of a list of
 28 specific impairments set forth in Appendix 1 to Subpart P of Part 404? If so, then the
 claimant is disabled. If not, then the evaluation proceeds to step four. (4) Is the claimant
 able to do any work that she has done in the past? If so, then the claimant is not disabled.
 If not, then the evaluation proceeds to step five. (5) Is the claimant able to do any other
 work? If not, then the claimant is disabled. If, on the other hand, the Commissioner can
 establish that there are a significant number of jobs in the national economy that the claimant
 can do, the claimant is not disabled. 20 C.F.R. § 404.1520. See also Tackett v. Apfel, 180
 F.3d 1094, 1098-99 (9th Cir. 1999).

II . STANDARD

The Commissioner's denial of benefits may be set aside if it is based on legal error or is not supported by substantial evidence. Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance. Id. Substantial evidence is "relevant evidence which, considering the record as a whole, a reasonable person might accept as adequate to support a conclusion." Flaten v. Secretary of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995).

III. DISCUSSION

Plaintiff argues that the ALJ's decision must be set aside because (1) the ALJ's assessment of Plaintiff's residual functional capacity was not supported by substantial evidence from the record; (2) the ALJ's reasons for discrediting Plaintiff's allegations of disabling pain were legally insufficient; and (3) the ALJ failed to resolve conflicts between the testimony of the vocational expert ("VE") and occupational information supplied by the Dictionary of Occupation Titles ("DOT"). The Court will address each of Plaintiff's arguments in turn.

A. The ALJ's RFC Assessment

With respect to Plaintiff's physical functional limitations, the ALJ's assessment was supported by substantial evidence. Although the ALJ gave significant weight to the medical expert's opinion, he did not adopt the medical expert's conclusion that Plaintiff was limited to lifting 25 pounds frequently and 50 pounds occasionally, with no postural limitations except occasional crawling, stooping, and avoidance of concentrated exposure to vibration. (AR 407.) Instead, the ALJ gave weight to the opinions of Brett K. Allen, D.C., Plaintiff's treating chiropractor, and T. Auerbach D.C., an Agreed Medical Examiner, both of whom concluded that Plaintiff was precluded from heavy lifting. (AR 214; 345.) The ALJ found that Plaintiff had the residual functional capacity to lift or carry 10 pounds

1 frequently and 20 pounds occasionally; sit for 6 hours out of an 8-hour workday; stand for
2 6 hours out of an 8 hour workday; no more than occasional bending and stooping; no
3 more than occasional use of the right hand for gross handling and fine fingering; and no
4 more than frequent rotation of the neck. (AR 24.)

5 The medical records do not reveal physical functional limitations greater than those
6 found by the ALJ. Plaintiff argues that the ALJ overlooked the portion of Dr. Auerbach's
7 report where Dr. Auerbach reviewed Plaintiff's past medical records. Dr. Auerbach's
8 summary of the medical records reflects that Dr. Allen's reports indicated that Plaintiff's
9 work status was TTD (temporarily totally disabled) from December 14, 2001 through July
10 14, 2003. (AR 338-43.) However, it does not appear that Dr. Allen made any specific
11 findings of functional limitation establishing that Plaintiff was disabled. In his August 11,
12 2003 report, which does discuss Plaintiff's functional limitations, Dr. Allan stated that
13 Plaintiff's disability precluded her from heavy work because Plaintiff had lost
14 approximately 50% of her pre-injury capacity to perform tasks such as lifting, pushing,
15 pulling, repeated bending, stooping, or comparable physical efforts. (AR 214.) Dr. Allan
16 also stated that Plaintiff should be precluded from prolonged flexion and rotational
17 movements of the head and neck. (*Id.*) The ALJ's RFC assessment is consistent with
18 Dr. Allan's specific findings regarding Plaintiff's functional limitations.²

19 Plaintiff argues that the ALJ erred in relying on the medical expert's testimony
20 because the medical expert testified outside his field of specialty, did not review the entire
21 medical file, and demonstrated bias against Plaintiff's treating physicians. Although the
22 medical expert's field of specialty was internal medicine and cardiology, he was still
23 competent to render a medical opinion in Plaintiff's case. See Kepple v. Massanari, 268
24 F.3d 513, 516 (7th Cir. 2001). Furthermore, the record does not support Plaintiff's

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26 ² Plaintiff argues that the only relevant evidence is medical records for the time prior
27 to March 31, 2002, because Plaintiff must establish disability on or before that date.
28 Plaintiff's argument lacks merit. Medical records after March 31, 2002 are still relevant
because Plaintiff does not claim that her condition significantly improved. In a report dated
November 18, 2002, Dr., Allan stated that Plaintiff's condition had "plateaued under
conservative treatment." (AR 340.)

1 contention that the medical expert was unprepared and biased to the degree that his
2 testimony could not be relied upon.

3 Plaintiff also argues that the ALJ erred in relying on an RFC assessment by
4 consultative examiner Dr. Sabourin, because Dr. Sabourin did not review Plaintiff's
5 medical records in preparation of the report. Dr. Sabourin concluded that Plaintiff could
6 lift or carry 20 pounds occasionally and 10 pounds frequently, could stand and walk up to
7 six hours of an eight-hour workday and sit for six hours of an eight-hour workday. (AR
8 220.) Although Dr. Sabourin did not review Plaintiff's medical records, he talked to
9 Plaintiff about the history of her illness and performed his own orthopedic examination,
10 cervical spine examination, lumbar spine examination, extremity examination and
11 neurological examination. (AR 218-20.) Therefore, Dr. Sabourin had a legitimate basis
12 for his opinion, and the ALJ did not err in giving weight to the opinion.

13 Plaintiff faults the ALJ for not finding limitations with respect to Plaintiff's left upper
14 extremity. Plaintiff points out that EMG studies showed that she had bilateral carpal
15 tunnel syndrome. (AR 313.) However, the record does not reflect that Plaintiff had any
16 functional limitations with respect to her left arm/hand as a result. The medical records
17 focused on Plaintiff's back pain and pain radiating to the lower extremities. During her
18 testimony, Plaintiff emphasized the problems she had using her *right* hand. (AR 398.)
19 When asked if lifting a gallon of milk repeatedly during the course of a day would cause
20 her any pain, she responded that it would cause her pain in her right hand. (AR 404.)
21 Plaintiff did not talk about weakness or pain in her left hand. Therefore, the ALJ did not
22 err in not finding functional limitations with respect to Plaintiff's left upper extremity.

23 Plaintiff argues that the ALJ failed to explain why Plaintiff's mental limitations did
24 not restrict her to part-time work. Consulting psychologist, Dr. Pena, performed a
25 psychological evaluation of Plaintiff in April, 2007. Dr. Pena diagnosed Plaintiff with Major
26 Depressive Disorder and noted that Plaintiff demonstrated "moderate cognitive and
27 functional impairments." (AR 359.) Dr. Pena also concluded: "Her ability to perform
28 simple and repetitive tasks with appropriate persistence and pace over *a part time work*

1 cycle, within a non-stressful environment, seems to be mildly limited at this time.” (AR
2 360) (emphasis added.)

3 The ALJ relied on Dr. Pena’s evaluation in finding that Plaintiff depression did not
4 meet or medically equal any of the listings. (AR 23.) It appears that the ALJ also relied
5 on Dr. Pena’s opinion in determining that Plaintiff was mentally limited to simple and
6 repetitive tasks. (AR 24.) However, the ALJ did not discuss the part-time work
7 restriction implicit in Dr. Pena’s opinion. It is unclear whether the ALJ simply overlooked
8 Dr. Pena’s reference to part-time work or whether the ALJ rejected the part-time work
9 restriction. To the extent that the ALJ rejected Dr. Pena’s opinion that Plaintiff’s mental
10 impairment limited her to a part-time work cycle, the ALJ did not provide reasons for such
11 rejection. Therefore, the Court remands the case so that the ALJ may make findings with
12 respect to whether Plaintiff’s mental impairment prevents her from working full-time.

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14 B. The ALJ’s Rejection of Plaintiff’s Pain Testimony

15 At the hearing, Plaintiff described disabling pain at the bottom of her back in
16 addition to pain shooting down her legs (mostly on the right side) and her right arm. (AR
17 392.) Plaintiff testified that she can sit for about 20 minutes, can stand for about 10
18 minutes, and cannot write more than her name with her right hand. (AR 298.) Plaintiff
19 testified that she spends most of the time laying on her side, does not drive anymore, and
20 can’t cook, clean, or shop for food. (AR 394, 300.) Plaintiff argues that the ALJ did not
21 provide clear and convincing reasons for finding that her statements concerning the
22 intensity, persistence and limiting effects of her symptoms were not entirely credible. The
23 Court disagrees.

24 In deciding whether to accept a claimant’s subjective symptom testimony, an ALJ
25 must perform two stages of analysis. See Smolen v. Chater, 80 F.3d 1273 (9th Cir.
26 1996). The first stage of analysis is a threshold test set forth in Cotton v. Bowen, 799
27 F.2d 1403 (9th Cir. 1986). Under this test, the claimant must (1) produce objective
28 medical evidence of an impairment or impairments; and (2) show that the impairment or

1 combination of impairments could reasonably be expected to produce some degree of
 2 symptom. Id. at 1407-08. If the claimant satisfies the Cotton test and there is no evidence
 3 of malingering, the ALJ can reject the claimant's testimony about the severity of his
 4 symptoms only by offering specific, clear and convincing reasons for doing so. Smolen,
 5 80 F.3d at 1281.

6 Plaintiff has produced objective medical evidence of impairments, and such
 7 impairments could reasonably be expected to produce some degree of pain. Therefore,
 8 the ALJ was required to provide clear and convincing reasons for rejecting Plaintiff's pain
 9 testimony.

10 Although not all of the ALJ's reasons for rejecting Plaintiff's pain testimony were
 11 valid, the ALJ did provide some legitimate reasons. The ALJ pointed out that Plaintiff was
 12 able to perform light household chores and grocery shop. These daily activities would be
 13 inconsistent with the degree of pain alleged by Plaintiff.³ In addition, the ALJ noted that
 14 Plaintiff had a normal gait and did not require any assistive devices to ambulate and that
 15 there was no evidence of disuse muscle atrophy, cognitive deficits due to pain, or
 16 appetite disturbance due to pain. These are all pertinent considerations. The ALJ also
 17 pointed out that Plaintiff's course of treatment has generally reflected a conservative
 18 approach. Plaintiff objects to the characterization of her treatment as "conservative."
 19 However, even Plaintiff's treating chiropractor, Dr. Allen, described her treatment as
 20 "conservative chiropractic treatment." (AR 215.) Although Plaintiff did receive some
 21 epidural steroid injections, she did not undergo any surgery. These reasons constitute
 22 clear and convincing reasons for rejecting Plaintiff's pain testimony.

23 24 C. Vocational Expert Testimony

25 Plaintiff contends that the ALJ improperly failed to resolve conflicts between the
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27 ³ The Court notes that Plaintiff has given varying accounts regarding her ability to
 28 grocery shop and clean. At the hearing, Plaintiff said she did not shop for food. (AR 399.)
 However, she told Dr. Pena that she liked grocery shopping and could perform light
 housecleaning chores. (AR 354.)

1 VE's testimony and the occupational information provided by the DOT. Plaintiff is correct.

2 The VE testified that Plaintiff would be capable of performing "unskilled work." (AR
3 415.) Assuming functional limitations of lifting 20 pounds occasionally, 10 pounds
4 frequently, standing up to 6 hours out of 8, and sitting for 6 hours out of 8, the VE testified
5 that Plaintiff could perform light duty work such as a cashier (DOT 211.362-010) or
6 inspector (DOT 716.687-030). Adding the additional limitation of occasional handling and
7 fine fingering with the right dominant extremity, the VE testified that the number of jobs
8 that existed were "extremely limited" but that Plaintiff could perform the job of host (DOT
9 352.667-010) or usher (DOT 344.137-010).

10 In his decision, the ALJ concluded that Plaintiff could perform the jobs of cashier
11 and host. However, according to the DOT, neither of these jobs is unskilled. Unskilled
12 jobs have a Specific Vocational Preparation (SVP) of 1-2 – i.e., the jobs can be learned
13 within 30 days. 20 C.F.R. § 404.1568(a). The host position has an SVP of 3 and the
14 cashier position has an SVP of 5.

15 Furthermore, the host position requires *frequent* reaching and handling and the
16 cashier position requires *frequent* reaching, handling, and fingering. The ALJ found that
17 Plaintiff was limited to *occasional* handling and fine fingering with her right hand.

18 SSR 00-4p explains that when there is an apparent unresolved conflict between
19 the VE's testimony and the occupational information provided by the DOT, the ALJ "must
20 elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to
21 support a determination or decision about whether the claimant is disabled." A
22 reasonable explanation for a conflict may be based on information that is not included in
23 the DOT – e.g., information obtained directly from employers or other publications about a
24 particular job's requirements. Id.

25 Under SSR 00-4p, the ALJ has an affirmative duty to (1) ask the VE if the evidence
26 he or she provided conflicts with information provided in the DOT; and (2) if the VE's
27 evidence appears to conflict with the DOT, the ALJ must obtain a reasonable explanation
28 for the apparent conflict. In Massachi v. Astrue, 486 F.3d 1149 (9th Cir. 2007), the Ninth

1 Circuit held that the ALJ must perform the inquiries under SSR 00-4p before relying on a
2 VE's testimony regarding the requirements of a particular job.

3 Here, the ALJ did not ask the VE whether her testimony conflicted with any
4 information provided in the DOT and, if so, whether there was a reasonable explanation
5 for the conflict. As discussed above, there was a conflict between her testimony and the
6 DOT. Accordingly, it is unclear what basis, if any, the VE had for testifying that Plaintiff
7 could perform the jobs of host and cashier.⁴

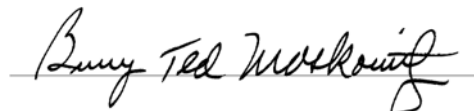
8 Therefore, the Court remands on the additional ground that the ALJ did not
9 perform the appropriate inquiries under SSR 00-4p.

10 11 **IV. CONCLUSION**

12 For the reasons discussed above, Plaintiff's motion for summary judgment is
13 **GRANTED** and Defendant's motion for summary judgment is **DENIED**. The Court
14 **REMANDS** this case so that the ALJ can (1) consider whether Plaintiff's mental
15 impairment prevent her from working full-time and (2) reevaluate whether, in light of
16 Plaintiff's limitations, Plaintiff can perform any job that exists in a significant number in the
17 national economy, keeping in mind the requirements of SSR 00-4p. The Clerk shall enter
18 judgment accordingly.

19 **IT IS SO ORDERED.**

20 DATED: March 18, 2009

21 

22 Honorable Barry Ted Moskowitz
23 United States District Judge

24
25 ⁴ When presented with the hypothetical including the limitations with respect to
26 Plaintiff's right upper extremity, the VE suggested "usher" (DOT 334.137-010) as a job
27 Plaintiff could do. However, the SVP for this job is at level 4 and is not unskilled. The
28 Commissioner suggests the alternate jobs of "cashier II" (DOT 211.645-010) and "goodwill
ambassador" (DOT 293.357-018). These jobs have an SVP of 2. However, they also
require frequent reaching, handling, and fingering. At any rate, the VE did not provide any
testimony regarding these jobs and it is not the Court's role to determine what other jobs
Plaintiff might be able to do.